CHE MAS BINTI CHE MAMAT v. KAMARIAH BINTE CHE SENIK & ORS.

[F.C. (Suffian L.P., Ali Hassan and Wan Suleiman F.JJ.) September 2, 1974]

[Kota Bharu — Federal Court Civil Appeal No. 10 of 1974]

Land law — Sale of land to recover arrears of quit rent — Allegation of conspiracy and fraud — Land sold by auction to beneficiaries — Action to set aside sale — Period of limitation applicable — Limitation Ordinance 1953, s. 9 — Kelantan Land Enactment s. 183.

In this case the deceased left two pieces of land registered in his name. It was alleged that the lands were sold by the deceased, one to one daughter and the other to another daughter. After the death of the deceased, the quit rent fell into arrears and the lands were sold by auction to the two daughters and they became registered proprietors in 1963. The other beneficiaries brought an action in 1970 to have the transmission to the two daughters set aside. The learned trial judge found on the evidence that the second daughter had bought the land from her father but he said he was not satisfied that the other land had been sold to the first daughter. On the plea of limitation he held that the claim was not statute-barred. In the event he dismissed the plaintiff's claim in respect of the land sold to the second daughter but allowed the plaintiff's claim in respect of the other piece of land. The plaintiffs appealed and the respondents cross-appealed.

Held: (1) in this case section 193 of the Kelantan Land Enactment was applicable and therefore the claims were statute-barred, as they were not brought within one year of the sale;

(2) that on the facts the pieces of land had been sold to the two daughters by their father in his lifetime and therefore the claim of the plaintiff should have been dismissed.

FEDERAL COURT.

C. Jegathesan for the appellant.

Datuk H. L. Wrigglesworth for the respondents.

Suffian L.P.: Senik bin Yusoff died intestate on 15th May, 1960. I shall refer to him simply as the deceased.

He died leaving two pieces of land, Lot 273 and Lot 453, in Mukim Padang Bongor registered in his name.

On 2nd February, 1963, the two lands were sold by public auction by the collector under section 180 of the Kelantan Land Enactment to recover arrears of quit rent for 1962. The successful bidders were two of the deceased's daughters, Esah and Kamariah, and in due course they became registered proprietors, Kamariah of Lot 273 and Esah of Lot 453.

As it happened the deceased had left two widows and children by each of them.

The junior widow Che Mas as administratrix of the deceased's estate (plaintiff) sued Kamariah (first defendant), Esah (second defendant), the senior widow Limah (third defendant) and the deceased's brother Ya'acob (fourth defendant), claiming that the transmission of the lands to the two daughters be set aside, that the lands be transmitted back to the deceased's estate, and other relief.

The junior widow has three daughters and a son and the senior widow two daughters, namely, the first two defendants, by the deceased.

The junior widow pleaded that the senior widow and all the other defendants by a conspiracy had knowingly and fraudulently allowed the quit rent to fall into arrears, so that the lands were auctioned by Government without the knowledge of the junior widow, whereupon the senior widow's two daughters successfully bid for the lands, that the defendants, without mentioning the existence of the other beneficiaries, fraudulently caused the Public Trustee to distribute the proceeds of the auction ($606.30) only among themselves.

It is to be noted that if the deceased had left only the senior widow and their two daughters, the deceased's brother (the fourth defendant) would have been one of the beneficiaries, but if the deceased had left a son also, then the deceased's brother would not have been a beneficiary.

In their defence the defendants admitted that the junior widow was a widow of the deceased and that she had three daughters and a son by the deceased, but they denied the conspiracy, they denied that the two lands were part of the deceased's estate, they claimed that the deceased had sold one piece of land to one daughter and the other to the other daughter, but the transfer was never registered as the deceased had lost the title deeds.

Finally the defendants pleaded that the action was statute-barred.

At the trial there was undisputed evidence given by Encik Mustaffa bin Abdul Karim, the Assistant Collector of Land Revenue, that the annual quit rent for Lot 273 was $1.20 and that for Lot 453 50 cents, that the arrears were for the year 1962 (and by necessary implication not for 1961), that the arrears came altogether to $3.20 for the first lot and $2.50 for the second (the extra $2 charged for each lot being to cover expenses), that the 1962 quit rent fell into arrears on 1st July, 1972, that the lots were knocked down to the first two defendants, and that they became registered proprietors on 29th July, 1963. The Assistant Collector further said that on 20th June, 1966, the plaintiff wrote to the District Officer claiming that she was also a widow with three daughters and a son by the deceased and complaining about the sale.

It should be stated that the plaintiff did not challenge the validity of the auction. Her complaint was directed against the senior widow and the other defendants who it was said had deliberately allowed the quit rent to fall into arrears without informing the other branch of the deceased's family.

The learned trial judge found that the arrears and expenses for 1962 were small, that probably one of the defendants (he did not specify whom) must have paid the quit rent for 1961, that the two daughters (the first two defendants) in collusion with the other two defendants had deliberately allowed the 1962 quit rent to fall into arrears so that they could buy the lands at the Collector's auction, that the fourth defendant knew of the auction, that the fourth defendant included his name as one of the beneficiaries when writing to the Assistant Public Trustee and that he did so not only (as he claimed) to help the other three defendants to get the proceeds of the auction. But as will be seen in a moment the learned judge did not despite this finding give judgment entirely in favour of the plaintiff.

As regards the defence that the deceased had sold the lands to his two daughters (the first two defendants) the evidence was as follows.

The first defendant said that about a year before the deceased's death the deceased had in 1959 sold Lot 453 to her for $250 which she paid in one lump sum and Lot 273 to the second defendant on the same day; that the deceased, the two daughters and the Penghulu, Encik Mohamed Ali bin Haji Mohamed, went to the Land Office, Kota Bharu, and saw the District Officer at whose request the deceased put up a statutory declaration regarding loss of the grants and no transfer was registered because the grants had been lost; that her father was a poultry dealer; and that he sold the land because he wanted money for his business.

The second defendant said that the deceased sold Lot 273 to her three to four years before his death for $250 which was paid in one lump sum; that the price was the same as for the other lot, though her lot was bigger; that she paid her father on the same day as her sister; that the sale could not be registered because there was no grant.

Their mother (the third defendant) gave evidence to the same effect.

The fourth defendant said that in 1959 his brother (the deceased) told him that he had sold the two lands to his two daughters; that the sales were not registered because the grants had been lost; and that the deceased made a statutory declaration to that effect.

The Penghulu aged 70 at the time of the trial said that he had retired ten years ago, that about a year before the deceased's death the witness went with the deceased and his daughters (the first two defendants) to transfer one lot each to the girls, that there was no registration because the deceased could not produce the grants which had been lost, that as it was late the deceased was asked to return to the Land Office to make a statutory declaration, that he did not know whether the deceased did so or not, and that the deceased told him that the first defendant paid $200 and the second defendant $300 for the lands.

Encik Mohamed Ariffin bin Daud, Deputy Land Registrar, said that a statutory declaration dated 30th January, 1960 (*i.e.*, about four months before the deceased's death) was put up by the second defendant declaring that the grant for Lot 273 belonging to her father had been lost while in her possession; that she had searched for it in vain; that the statutory declaration was filed on 2nd February, 1960, and accepted under section 194(1)(g) of the Land Enactment; and that the second defendant did not say in the statutory declaration that she had bought the land.

The learned trial judge was satisfied on the evidence that the second defendant had in fact bought Lot 273 from her father "as her evidence to that effect has been corroborated by the statutory declaration regarding loss of the title which she had made. I can see no reason why she had made that statutory declaration during the lifetime of her father except that she had bought the lot concerned from him".

As regards Lot 453, the learned trial judge was not satisfied that it had been sold to the first defendant. He said, "I consider it highly improbable that the deceased would have sold both the lots to raise money for his fowl dealing business and the first defendant's allegation that she had bought that lot at the same price as that paid by the second defendant for the other lot which was much bigger in area cannot reasonably be true. The sale prices at the auction show that Lot 273 had fetched a much higher price than Lot 453".

Finally the learned trial judge dealt with the defence of limitation and held that section 37(ii) of the Land Enactment applied and that the period of limitation under section 9 of the Limitation Ordinance 1953 was twelve years and that accordingly the claim was not statute-barred.

In the event he dismissed the plaintiff's claim to Lot 273 which he held had been sold by the deceased to the second defendant and allowed the plaintiff's claim to Lot 453 registered in the name of the first defendant.

The plaintiff appeals to this court, asking for judgment in her favour as regards Lot 273 also which she maintains has not been sold to the second defendant and therefore still belongs to the deceased's estate.

The defendants cross appeal, asking for judgment in favour of the first defendant also as regards 453 which they maintain the first defendant had bought from her father.

The defence of limitation is reiterated before us.

With respect to the learned trial judge I am of the opinion that the plaintiff's claim is statute-barred and should have been dismissed.

The sales by the Collector were finalised, and as a result the two lots were registered in the names of the first two defendants, on 29th July, 1963. Consequently by virtue of subsection (i) of section 37 of the Kelantan Land Enactment which was in force then their titles became indefeasible. They are not indefeasible only in the case of fraud or misrepresentation to which each of them is proved to be a party. See subsection (ii) of the same section. The plaintiff sought in this suit to prove that each of the first two defendants (as well as the other two defendants) was party to fraud, such that the titles of the first two defendants are not indefeasible. In my view section 9 of the Limitation Ordinance, 1953 (which provides that no action shall be brought to recover any land after the expiration of twelve years from the date on which the right of action accrued to the plaintiff) does not apply to this suit, because section 3 of that Ordinance expressly provides that the Ordinance does not apply to any action for which a period of limitation is prescribed by any other written law. That other written law is section 193 of the Kelantan Land Enactment which reads:

> "(i) No suit shall be brought in any court for damages or for the annulment of any ..... sale under this Part until an application shall have been made to and considered by the Commissioner of Lands and Mines under section 192.

(ii) .....

(iii) Notwithstanding the provisions of subsection (i) of this section, in the case of fraud by any person in connection with any .... sale under this Part, the person who was proprietor of the land prior to such .... sale or his representative [the plaintiff here is a representative] may at any time within twelve months from the date of such .... sale apply to the court for an order that such .... sale be annulled, and the court may make an order accordingly together with such order as to the payment of such damages, compensation or costs as to the court may seem proper."

In my judgment the effect of the above provision is that if a person in the position of the plaintiff seeks to annul a sale by the Collector she should first apply under section 192 of the Kelantan Land Enactment, but that if she alleges fraud by any person in connection with the sale she may go straight to court without making an application under section 192, that if she goes to court she must file her suit within twelve months of the date of the sale and that if she sues twelve months after the sale she is statute-barred.

The learned trial judge held that there was a conspiracy between the defendants to allow the 1962 quit rent to fall into arrears, but he further held that that conspiracy did not amount to fraud because the second defendant had in fact bought the first lot from her father. In any event, the learned trial judge went on, the plaintiff did not allege fraud in respect of the sales themselves, meaning that the plaintiff did not allege fraud on the part of any officer in the Land Office who organised and conducted the sale, and that all the plaintiff alleged was that only the defendants were guilty of fraud, in the sense that they purposely allowed the 1962 quit rent to fall into arrears and when they knew that the lots were to be sold by the Government they deliberately kept the junior widow and her children in the dark, so that they would have a chance of getting the lands cheap.

With respect to the learned trial judge, I am of the opinion that the words "fraud by any person in connection with any... sale under this Part" cover conspiracy which he found the four defendants guilty of and that accordingly the plaintiff's claim is statute-barred.

Even assuming, without deciding, that under subsection (iii) of section 193 of the Kelantan Land Enactment the plaintiff could have started this suit within twelve months of her first coming to know of this sale, she would still have been out of time, because from the letter (Exhibit P5) which she wrote to the Land Office she first knew of the sale on 20th June, 1966, and yet she did not bring this suit until over four years later on 22nd November, 1970.

I would therefore have dismissed the plaintiff's claim. In other words I would dismiss the appeal and allow the cross-appeal.

Apart from my view on limitation, I would on the facts also, on the grounds stated by my brother Ali F.J., dismiss the appeal and allow the cross-appeal.

In the result, I would therefore set aside the learned trial judge's order and for it substitute an order simply dismissing the plaintiff's claim with costs. The defendants shall also have the costs of this appeal. The deposit paid by the appellant be paid to the respondents against their taxed costs.

Ali F.J.: (1) The appellant's appeal, considered separately, is against the finding of fact that the second defendant had bought Lot No. 273 from her deceased father, Senik bin Yusoff. The defence evidence to this effect was given by both defendants themselves, their mother (DW3) and deceased's elder brother, the Penghulu (DW4). There was nothing in the evidence for the plaintiff/appellant to suggest that any of the witnesses was being untruthful. In his judgment the learned trial judge said —

"I am satisfied that the 2nd defendant had in fact bought Lot 273 from him as her evidence to that effect has been corroborated by the S/D regarding loss of the title which she had made. I can see no reason why she had made that S/D during the lifetime of her father except that she had bought the lot concerned from him."

I cannot find any reason for interfering with the trial court's finding. I agree that the appeal be dismissed with costs.

(2) The cross-appeal is on two grounds, namely, (i) the trial judge erred in not holding the plaintiff's claim statute-barred; and (ii) he erred in finding the first defendant had not bought Lot 453 from her father.

The finding against the first defendant was stated thus:

"In the absence of similar or other documentary evidence I am not satisfied that the 1st defendant had bought Lot 453 from her deceased father."

With respect, I find it difficult to reconcile this with the finding in favour of the second defendant in view of the evidence. If as stated in the earlier passage of the judgment quoted above that second defendant's evidence was corroborated by her statutory declaration it follows that what she said as regards Lot 453 having been bought by the first defendant must also be true. In cross-examination she said "I paid the $250 to my father on same day first defendant paid hers." The finding against the first defendant seems illogical and unreasonable. I would set it aside and substitute a finding that first defendant bought Lot 453 from her deceased father. On this finding the cross-appeal is allowed with costs.

On the defence of limitation the arguments before the trial court raised the question whether section 193(iii) of the Kelantan Land Enactment 1938 or section 9 of the Limitation Ordinance 1953 applies. Section 193 (iii) of the Kelantan Land Enactment provides —

"Notwithstanding the provisions of subsection (i) of this section, *in the case of fraud by any person in connection with any reversion or sale under this Part*, the person who was proprietor of the land prior to such reversion or sale or his representative may at any time within 12 months from the date of such reversion or sale apply to the court for an order that such reversion or sale be annulled, and the court may make an order accordingly together with such order as to the payment of damages, compensation or costs as to the court may seem proper." (The emphasis is mine).

This provision speaks of fraud by any person in connection with any reversion or sale. As it seems to me if any sale at an auction is tainted with fraud it can

be set asde or annulled by an order of court provided such order is applied for within 12 months from the date of the sale. No such order has been applied for or obtained by the plaintiff/appellant. It is in this context that the respondent has raised the defence that the claim is statute-barred. Strictly speaking, a defence of limitation is usually raised against a claim founded on a cause of action which however good it may be is barred by the statute of limitation because the claim is not made within the time prescribed by the Statute. Section 9 of the Limitation Ordinance 1953 prescribes a period of 12 years within which a claim for recovery of lands has to be made. Subsection 2(b) of the said section, however, provides that the Section shall not apply to "any person registered under or by virtue of the provisions of the Land Code of the Federated Malay States or of any corresponding Land Enactment in force in any State as the proprietor of the land sought to be recovered .... except to the extent in such Code or Enactment so provides or permits." Section 3 of the Limitation Ordinance further provides that the Ordinance shall not apply to any action for which a period of limitation is prescribed by any other written law.

In the course of arguments it was contended on behalf of the respondents that section 193(iii) applies. If it does, this can only mean that when the plaintiff's action was filed in November 1970 the plaintiff had no cause of action against any of the defendants. The plaintiff's right to recover the lands from the defendants was lost when she failed to apply for or obtain a court order to annul the sale under section 193(iii) of the Enactment. The sales were finalised or completed on the 29th July, 1963. On that date the respondents were registered as purchasers. The evidence of the Assistant Collector of Land Revenue, Kota Bharu was to this effect. The plaintiff/appellant filed her action some 7 years after the sales. By that time the Kelantan Land Enactment was already repealed by the National Land Code. It was repealed with effect from 1st January, 1966. In these events it would be correct to say that inasmuch as there was no longer any right existing to have the sales annulled immediately before the repeal of the Kelantan Land Enactment took effect the right is not revived merely because of the repeal. Section 29 of the Interpretation Act No. 23 of 1967 is to this effect. The trial judge, in my view, erred in holding that the claim is not statute-barred. He should have dismissed the claim against both defendants on the ground that there was no cause of action.

In the result I would dismiss the plaintiff's appeal with costs and allow the defendants' cross-appeal with costs.

Wan Suleiman F.J. concurred.

Appeal dismissed.

Solicitors: *C. Jegathesan; Wrigglesworth & Co.*

PUBLIC PROSECUTOR v. LEE CHIN CHAI

[F.C. (Gill C.J., Ali and Ong Hock Sim F.JJ.) October 4, 1974]

[Kuala Lumpur — Federal Court Criminal Reference No. 1 of 1974]

Fisheries Act, 1965 — Possession of fishing appliances without a licence — Whether vessel in which fishing appliances were found liable to seizure and forfeiture.

In this case the accused had pleaded guilty to two charges of possession of fishing appliances without a licence and possession of fish allegedly caught with the aid of explosives. The vessel in which the fishing appliances was found had been detained and the learned magistrate after an inquiry made an order for the return of the vessel to the owner. On appeal by the Public Prosecutor, it was held in the High Court ([1974] 1 M.L.J. 205) that the vessel was not subject to seizure and forfeiture under the Fisheries Act, 1965. The Public Prosecutor applied for the matter to be referred to the Federal Court and the following question of law of public interest was referred to the Federal Court—

> "Whether a vessel in which 'fishing appliances' are found contrary to Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967, is a thing in respect of which an offence has been committed contrary to the provisions of the Act or any regulations or rules made thereunder, and thereby liable to seizure under section 14(1) of the Fisheries Act, 1963 (as amended by Act A152 of 1972) and consequently liable to forfeiture under section 15(1) of the Fisheries Act 1963 (as amended by Act A152 of 1972).

Held: what may be seized under section 14 of the Fisheries Act are only things in respect of which an offence has been committed and as Regulation 3(b) of the Fisheries (Maritime) Regulations, 1963, makes it an offence to possess fishing appliances without a licence, only these can be the subject matter of an offence and the vessel in which they are found is not included. Therefore the question reserved for the court must be answered in the negative.

Cases referred to:-

(1) *Tan Khoo Chor* v. *Public Prosecutor* [1941] M.L.J. 160.

(2) *Williams* v. *Wynne* L.J. (N.S.) Vol. 57 Mag. Cas. 30.

FEDERAL COURT.

Lamin bin Haji Yunus (Deputy Public Prosecutor) for the appellant.

A. Wilson for the respondents.

Ong Hock Sim F.J. (delivering judgment of the Court): This is a Reference under section 66 of the Courts of Judicature Act, 1964 (Act 91 — Revised 1972) on the application of the Public Prosecutor, reserving for the decision of this court the following question of law of public interest:

> "Whether a vessel in which 'fishing appliances' are on board contrary to Regulation 3(b) of the Fisheries (Maritime) Regulations, 1967 is *a thing in respect of which an offence has been committed* contrary to the provisions of the Act or any regulations or rules made thereunder, and thereby liable to seizure under section 15(1) of the Fisheries Act, 1963 (as amended by Act No. A152 of 1972) and consequently liable to forfeiture under section 15(1) of the Fisheries Act, 1963 (as amended by Act No. A152 of 1972)."

The first respondent, a twenty-five year old Singaporean, was captain of a vessel bearing Fishing Boat Licence No. 00933, issued presumably under Fishing Vessels (Control and Licensing) Rules, 1969, Singapore. He had Fishing Gear Licence No. 00585/26 February 1972 and a proper Port Clearance Document. All these went to show in our view an absence of *mens rea* or intention to contravene the Fishery Laws of this country when they entered territorial waters.